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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of James T. and Elizabeth A. Gruba, and Leo G. and Jeanne R. Barsanti,	)	REGULATORY DIVISION
Complainants	)	DOCKET NO. D2010.2.14
vs.	)	
NorthWestern Energy,	)	
Defendant	)	

NorthWestern Energy's Reply to Complainants' Response to Motion to Compel Compliance with Order No. 7084i

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"), by and through its undersigned counsel, submits this brief reply in order to respond to assertions made by Complainants in their *Response to NorthWestern Energy's Motion to Compel Compliance with Order No. 7084i* ("Response"). After review of the Response, NorthWestern submits this reply to address those assertions made in the Response that are new, contain faulty logic, or are red herrings. For those matters not specifically discussed herein, NorthWestern relies on and reasserts the arguments made in its *Motion to Compel Compliance with Order No. 7084i* ("Motion"). After considering the parties' pleadings on this issue, the Commission should order

Complainants to comply with Order No. 7084i by striking the testimony identified in NorthWestern's Motion.

SMALLEY TESTIMONY

NorthWestern's Motion asserts that Complainants failed to comply with Order No. 7084i by not striking all of the Edward Smalley testimony. Motion, p. 6. Complainants' Response asserts that the non-stricken Smalley testimony is relevant and should be allowed to remain because it "is within the scope of this docket" and "does not reference LED street lighting." Response, pp. 8-9. Complainants refuse to recognize that the Commission, with issuance of Order No. 7084i, has already rejected that argument and ordered Complainants to strike the entire Smalley testimony.

In its Motion to Strike Testimony of Edward Smalley ("Smalley Motion"), NorthWestern argued that the Smalley testimony regarding Seattle City Light's lighting rate structure was not relevant to the remaining issue in this docket. Smalley Motion, p. 4. Complainants' response to the Smalley Motion did not address NorthWestern's argument on that particular testimony. In Order No. 7084i, the Commission granted NorthWestern's Smalley Motion, which requested that the Edward Smalley testimony be stricken in its entirety. The Commission should reject Complainants' attempt to now argue that the testimony regarding Seattle City Light is relevant. This issue has been decided. The Commission should order Complainants to comply with Order No. 7084i and strike the remainder of the Edward Smalley testimony.

TEMPORARY RATE REDUCTION TESTIMONY

Complainants argue that the testimony regarding rate reduction effects is permissible as relevant testimony because if the request had been granted "energy efficient light[s] would be illuminating [Gruba's Special Improvement Lighting and Maintenance District] at a much

cheaper price than is now being charged." Response, pp. 5-6. Such testimony is not relevant to the question of whether NorthWestern's current street lighting tariff is unjust and unreasonably discriminatory because this docket is not about which lighting technology is the cheapest. The Commission should reject Complainants' attempt to justify the inclusion of this testimony in the evidentiary record. This testimony must be stricken to comply with Order No. 7084i.

OBSERVATIONS BY LAY WITNESSES

Several times in their Response, Complainants assert that the testimonies of Messrs. Barsanti, Gruba, and Simon are appropriate because they are explaining their calculations that demonstrate an alleged overcharge. Response, pp. 10, 34, 41, 42, 44, 46, 51. The issue with this explanation is the Commission has already determined that these witnesses have not demonstrated that they are experts. Only expert witnesses can provide opinions concerning utility rate-making or other matters that require specialized knowledge or expertise. As the Commission noted in Order No. 7084i, ¶ 28, lay witnesses are permitted to give "testimony in the form of opinions or inferences [so long as it is] limited to those which are rationally based on the perception of the witness." These opinions must be "based on the witnesses' own observations." Order No. 7084i, ¶ 29 (citation omitted). Complainants appear to be using these statements in an attempt to spin their witnesses' testimony into scenarios in which they are providing their observations about their calculations. This attempt to justify the testimony should be rejected. These individuals are providing expert testimony without being qualified as experts. Their testimony must be stricken in compliance with Order No. 7084i.

WHETHER CORRECT OR NOT, IRRELEVANT TESTIMONY MUST BE STRICKEN

In response to NorthWestern's Motion, Complainants assert that "NorthWestern has not submitted an affidavit by a so-called rate expert in support of its motion, indicating that anything

Mr. Towe said is wrong." Response, pp. 12-13. This assertion should be ignored. There is nothing in law that requires a party to show that the other party's testimony is incorrect or wrong before the tribunal is permitted to strike the testimony. The Rules of Evidence govern what evidence is allowed to be considered by a tribunal when deciding a matter. The necessary showing from a party on this matter is relevancy. *See* Rule 401 of the Montana Rules of Evidence. The Commission should reject this argument from the Complainants.

LEGAL ARGUMENT IS NOT FACTUAL TESTIMONY REGARDING LEGAL MATTERS/PRACTICES

Complainants' Response attempts to justify the legal arguments contained in the testimony of Tom Towe as appropriate testimony. Response, pp. 14-15, 22, 29. Complainants assert that such testimony is permissible because "NorthWestern opened up [the] issue." *Id.,* at pp. 22 and 29. Contrary to Complainants' assertions, NorthWestern did not "open up" a legal issue, but even if for the sake of argument it did, that is not justification for providing legal arguments in testimony. Complainants claim NorthWestern "opened up" issues in situations where NorthWestern either responded to the Complainants' complaint or to discovery propounded by the Complainants. A standard and accepted response in an answer to a complaint is that the answering party avers that a statute or other document "speaks for itself." NorthWestern provided this response in several instances in its answer. Based on NorthWestern's answer to one particular paragraph of the complaint, Complainants asked NorthWestern discovery questions about a case decided in 1979 by the Montana Supreme Court. NorthWestern responded to the question but also included a statement that it believed the discovery question was not "relevant to the facts or claims in this case." *See* NorthWestern's response to C-006. Since discovery relevance is broader than admissibility relevance,

NorthWestern did not object to the discovery question, but was signaling that it would object to the admissibility of such response in the record at hearing.

Notwithstanding the reasons Complainants give for their testimony containing legal argument, these arguments are reserved for briefing by attorneys representing parties in a docket. Lawyers can be witnesses, but if they are, they must testify to facts. A recent example of a lawyer testifying before the Commission is found in Docket No. D2012.5.49. Mr. Fred Lyon was a witness who, among many things, testified regarding waiver of consequential damages in contracts with major equipment manufacturers. *See* Prefiled Rebuttal Testimony of Fred Lyon, pp. 7-13. In that case, Mr. Lyon was testifying about his knowledge of such situations. He did not present legal arguments. Mr. Towe's testimony in this docket incorrectly includes legal argument, which is reserved for the attorneys of record in the docket, not the witnesses. His legal argument should be stricken.

ORAL ARGUMENT

Complainants have requested oral argument on NorthWestern's Motion. Response, p. 1. NorthWestern does not believe oral argument on this matter is necessary and that the Commission can decide the Motion based on the briefs. If the Commission grants Complainants' request for oral argument, NorthWestern will participate.

Respectfully submitted this 26th day of May, 2015.

NORTHWESTERN ENERGY

By: Sarah Norcott

Sarah Norcott
Attorney for NorthWestern Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Reply to Complainants' Response to Motion to Compel Compliance with Order No. 7084i in Docket No. D2010.2.14 has been hand delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. This will be e-filed on the PSC website and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid. This will also be emailed to appropriate parties per Procedural Order No. 7084h.

Date: May 26, 2015

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